NOAA's procedural regulations. It appears that the commenter is seeking to probe the NOAA attorney's thought processes in deciding what facts and arguments to present. As the U.S. Supreme Court established in *Hickman* v. *Taylor*, 329 U.S. 495 (1947), such thought processes are protected from disclosure absent a compelling need, which is not present here. See also *Shelton* v. *American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986) (party seeking to depose opposing counsel in a pending case must show that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case); *Nationwide Mut. Ins. Co.* v. *Home Ins. Co.*, 278 F.3d 621, 628 (6th Cir. 2002) (adopting the Eight Circuit test in Shelton).

Classification

This final rule has been determined to be not significant for purposes of Executive Order 12866.

There are no reporting, recordkeeping or other compliance requirements in this rule. Nor does this rule contain an information-collection request that would implicate the Paperwork Reduction Act, 44 U.S.C. § 3501, *et seq.*

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

Pursuant to 5 U.S.C § 553(d)(3), NOAA finds that there is good cause to waive the 30–day delay in the effective date of this rule. This rule is purely procedural in nature: it does not affect the substantive requirements of the regulations at 15 CFR part 904, nor does it modify, add, or revoke any existing rights and obligations of affected parties or the public. NOAA, therefore, finds that there is good cause, within the meaning of 5 U.S.C § 553(d)(3) and in accordance with the Congressional Review Act, 5 U.S.C § 808(2), to make this rule effective immediately.

List of Subjects in 15 CFR Part 904

Administrative practice and procedure, fisheries, fishing, fishing vessels, penalties, seizures and forfeitures.

Dated: June 14, 2010.

Lois J. Schiffer,

General Counsel, National Oceanic and Atmospheric Administration.

■ For reasons set forth in the preamble, 15 CFR part 904 is amended as follows:

PART 904–CIVIL PROCEDURES

■ 1. The authority citation for part 904 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*, 16 U.S.C. 1531–1544, 16 U.S.C. 1361 *et seq.*, 16 U.S.C. 3371–3378, 16 U.S.C. 1431–1445c–1, 16 U.S.C. 773–773k, 16 U.S.C. 951–962, 16 U.S.C. 5001–5012, 16 U.S.C. 3631–3645, 42 U.S.C. 9101 *et seq.*, 30 U.S.C. 1401 *et seq.*, 16 U.S.C. 971–971k, 16 U.S.C. 781–785, 16 U.S.C. 2401–2413, 16 U.S.C. 2431–2444, 16 U.S.C. 972–972h, 16 U.S.C. 916–916l, 16 U.S.C. 1151 *et seq.*, 16 U.S.C. 3601–3608, 16 U.S.C. 3631–3645, 16 U.S.C. 1851 note; 15 U.S.C. 5601 *et seq.*, Pub. L. 105–277, 16 U.S.C. 1822 note, Section 801(f), 16 U.S.C. 2465(a), 16 U.S.C. 5103(b), 16 U.S.C. 1385 *et seq.*, 16 U.S.C. 1822 note (Section 4006), 16 U.S.C. 4001–4017, 22 U.S.C. 1980(g), 16 U.S.C. 5506(a), 16 U.S.C. 5601–5612, 16 U.S.C. 1822, 16 U.S.C. 973–973R, 15 U.S.C. 330–330(e)

■ 2. Section 904.204 to subpart C is amended by revising paragraphs (f) and (m) to read as follows:

Subpart C-Hearing and Appeal Procedures

§ 904.204 Duties and powers of Judge.

* * * * *

(f) Rule on contested discovery requests, establish discovery schedules, and, whenever the ends of justice would thereby be served, take or cause depositions or interrogatories to be taken and issue protective orders under § 904.251(h);

* * * * *

(m) Assess a civil penalty or impose a permit sanction, condition, revocation, or denial of permit application, taking into account all of the factors required by applicable law;

* * * * *

[FR Doc. 2010–15213 Filed 6–22–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 260

[Docket No. RM07–10–002; Order No. 704–C]

Transparency Provisions of Section 23 of the Natural Gas Act

Issued June 17, 2010.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule; order granting clarification.

SUMMARY: In this Order Granting Clarification, the Commission addresses pending requests to clarify Form No. 552, under which natural gas market participants must annually report information regarding physical natural gas transactions that use an index or that contribute to or may contribute to the formation of a gas index. Order No. 704 required market participants to file these reports in order to provide greater transparency concerning the use of indices to price natural gas and how well index prices reflect market forces.

Order No. 704–C revises Form No. 552 so as to exempt from reporting any unexercised options to take gas under a take-or-release contract; clarify the definition of exempt unprocessed natural gas transactions as those involving gas that is both not yet processed (to separate and recover natural gas liquids), and still upstream of a processing facility; exempt from reporting cash-out and imbalance transactions, since they were burdensome to report and provided little market information; strike the form's references to the blanket sales certificates issued under § 284.402 or § 284.284, since they were burdensome to report and provided little market information, so as to also exempt small entities who were obligated to report solely by virtue of possessing a blanket sales certificate; and make several non-substantive modifications to Form No. 552 in an effort to make it more user-friendly.

DATES: *Effective Date:* This rule will become effective September 30, 2010.

FOR FURTHER INFORMATION CONTACT:

Vince Mareino (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6167, *Vince.Mareino@ferc.gov.*

Thomas Russo (Technical Information), Office of Enforcement, Federal Energy

Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8792, *Thomas.Russo@ferc.gov.*

Before Commissioners: Jon Wellinghoff, Chairman; Marc Spitzer, Philip D. Moeller, and John R. Norris.

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1. The Federal Energy Regulatory Commission's (Commission) FERC Form No. 552 requires certain natural gas market participants to identify themselves and provide summary information about physical natural gas transactions on an annual, calendar year basis.[1] In this order, the Commission addresses pending requests to clarify Form No. 552, resolve issues discussed in comments in this docket and at the March 25, 2010 Technical Conference (Technical Conference), and provide additional guidance for Respondents. Further, the Commission, in light of its experience administering the first year of Form No. 552, clarifies the exclusion of transactions involving volumes of unprocessed natural gas. The Commission adopts a revised Form No. 552 incorporating these modifications, which is included in the Appendix to this order.

I. Background

2. On December 26, 2007, the Commission issued a Final Rule in Order No. 704,[2] which amended Part 260 of its regulations to require the annual submission of a new form, Form No. 552. Order No. 704 has its genesis in the Energy Policy Act of 2005,[3] which added section 23 of the Natural Gas Act (NGA). Section 23 of the NGA, among other things, directs the Commission "to facilitate price transparency in markets for the sale or transportation of physical natural gas in interstate commerce, having due regard for the public interest, the integrity of those markets, and the protection of consumers."[4] Accordingly, Order No. 704 required natural gas wholesale market participants, including a number of entities that may not otherwise be subject to the Commission's traditional NGA jurisdiction, to report certain information concerning their natural gas sales and purchases annually.

3. The basic purpose of these reports is to provide greater transparency concerning the use of indices to price natural gas and how well index prices reflect market forces. Many market participants rely on indices as a way to reference market prices without taking on the risks of active trading. However, the Commission found that there was insufficient information available to the Commission and market participants to assess whether the gas indices are derived from a robust market of fixed-price transactions and thus accurately reflect market forces. For example, there was no way to determine the volumetric relationships between (a) the fixed-price, next day and next month delivery transactions that form gas price indices; and (b) transactions that use indices.

4. Accordingly, Order No. 704, as clarified and modified by Order Nos. 704–A[5] and 704–B,[6] requires market participants with reportable physical natural gas purchases or sales equal to or greater than 2.2 trillion British Thermal Units[7] to report the following information on Form No. 552:

(1) Total volume of the respondent's reportable physical sales and purchases during the year;

(2) Quantities contracted at fixed prices for next day delivery;

(3) Quantities contracted at prices that refer to published daily gas price indices;

(4) Quantities contracted at fixed prices for next month delivery;

(5) Quantities contracted at prices that refer to published monthly gas price indices;

(6) Quantities contracted under trigger agreements, such as NYMEX Plus contracts; and

(7) Quantities contracted as physical basis transactions.[8]

5. The Commission has engaged in substantial outreach efforts related to Form No. 552. These efforts are intended to inform market participants of the obligation to file Form No. 552, to answer questions regarding the form, and to identify ways to improve it. Commission Staff has provided informal guidance to dozens of individual Respondents as well as to various natural gas industry associations representing Respondents. This outreach includes one-on-one telephone conferences with potential Respondents, conference calls with a number of industry participants, presentations to groups of market participants, and the creation and updating of a Frequently Asked Questions (FAQ) list available on

[1] FERC Form No. 552 (Form No. 552): Annual Report of Natural Gas Transactions. A copy of Form No. 552, as revised by this order, is attached hereto in the Appendix. The revised form will be available on the Commission's Web site at *http://www.ferc.gov/docs-filing/forms.asp* in the near future. Where appropriate, terms defined in Form No. 552 are capitalized herein.

[2] *Transparency Provisions of Section 23 of the Natural Gas Act,* Order No. 704, FERC Stats. & Regs. ¶ 31,260, 73 FR 1014 (2007) (Final Rule) (Order No. 704).

[3] Energy Policy Act of 2005, Public Law 109–58, 119 Stat. 594 (2005).

[4] 15 U.S.C. 717t–2(a)(1) (2006).

[5] *Transparency Provisions of Section 23 of the Natural Gas Act,* Order No. 704–A, 73 FR 55726 (Sept. 26, 2008), FERC Stats. & Regs. ¶ 31,275 (2008) (Order No. 704–A).

[6] *Transparency Provisions of Section 23 of the Natural Gas Act,* Order No. 704–B, 125 FERC ¶ 61,302 (2008) (Order No. 704–B).

[7] 2.2 TBtus, or roughly 2.2 million dekatherms.

[8] Respondents must also explain any difference between the total volumes of their reportable purchases and sales reported in response to item (1) above and the sum of the corresponding quantities reported in response to items (2) through (7).

the Commission's Web site.[9] Commission Staff has also discussed Form No. 552 compliance with major trade organizations through conference calls and direct presentations. In addition, the Commission has addressed specific questions regarding Form No. 552 compliance through our Enforcement Hotline, Compliance Help Desk, direct calls to Staff members, and e-mails addressed to our dedicated Form No. 552 mailbox (*form552@ferc.gov*).

6. The Commission extended the deadline for filing the first Form No. 552, for calendar 2008, from May 1, 2009 to July 1, 2009.[10] The Commission received Form No. 552 for calendar year 2008 from 1,109 Respondents. The vast majority of these participants timely submitted Form No. 552, though the Commission granted seven requests for limited extensions of time to submit the form. Filed copies of each Respondent's Form No. 552 are publicly available in the Commission's Web site in eLibrary. The entire Form No. 552 database for calendar year 2008 is also available for download at *http://www.ferc.gov/docs-filing/forms/form-552/data.asp.* While most Respondents correctly completed Form No. 552, the Commission believes that additional clarifications to Form No. 552 would enhance regulatory certainty and improve the quality of data elicited in the form.

7. The American Gas Association (AGA) and Pacific Gas and Electric Company (PG&E) submitted requests for clarification of Order No. 704 on October 9, 2009 and November 3, 2009, respectively. These requests are discussed below. In addition, Commission Staff held a Technical Conference to discuss:

(1) Inconsistencies in reporting upstream transactions in the natural gas supply chain on Form No. 552, and whether these transactions contribute to wholesale price formation;

(2) Whether transactions involving balancing, cash-out, operational, and in-kind transactions should be reported on Form No. 552; and

(3) Whether the units of measurement (TBtu) currently used for reporting volumes in the form are appropriate.[11]

Lastly, in addition to the discussion at the Technical Conference, the Commission received numerous written comments in this docket, which we also discuss below.

8. Although the Commission and its Staff have provided considerable guidance with regard to these reporting requirements, because of the importance the Commission puts on compliance and its efforts to provide clear and understandable rules, the Commission finds that Form No. 552 should be revised to further clarify Respondents' obligations.

II. Clarifications

A. Use of Indices

1. Request for Clarification

9. Form No. 552, at page 4 line 3, requires respondents to report "what quantities were contracted at prices that refer to published Next-Day Delivery gas price indices." Similarly, respondents are required to report, at line 5, "what quantities were contracted at prices that refer to published Next-Month Delivery gas price indices." AGA requests that the Commission modify Form No. 552 to state clearly that the transactions reportable on these lines "are transactions that are contracted at prices that refer to daily or monthly gas price indices regardless of whether such transactions are themselves for next-day delivery or for next-month delivery."[12] AGA claims that this clarification is necessary to resolve ambiguity in the form that has led some Respondents to submit inaccurate calendar year 2009 information.

10. In particular, AGA argues that Order No. 704 was unclear as to whether the index-priced transactions required to be reported in line 3 or 5 must themselves be next-day or next-month transactions or whether all transactions that refer to daily or monthly gas price indices should be reported even if they do not require gas to be delivered the next day or month.

11. AGA states that Order No. 704–A appeared to clarify that only index-priced transactions that were for next-day or next-month delivery were required to be reported in lines 3 and 5, respectively. Among other things, AGA points out that Order No. 704–A revised the instructions to Form No. 552 by specifically excluding from the reporting requirements "Fixed Price transaction volumes that are not Next-Day Delivery or Next-Month Delivery."[13] Thus, AGA argues, the fact only next-day and next-month fixed price transactions were required to be reported suggested that, similarly, only index priced transactions that were themselves next-day or next-month transactions were required to be reported on line 3 or 5. AGA also points out that that Order No. 704–A revised lines 3 and 5 of the Form No. 552 to specify that the transactions reportable on line 3 were volumes "contracted at prices that refer to published Next-Day Delivery gas price indices," and that the transactions reportable on line 5 were volumes "contracted at prices that refer to published Next-Month Delivery gas price indices." AGA states that the addition of the phrases "Next-Day Delivery" and "Next-Month Delivery" created uncertainty as to whether those phrases applied to the transactions to be reported or only modified the referenced gas price indices.

12. Against this background, AGA argues that as market participants began to prepare to file Form No. 552 to report their 2008 calendar year transactions there was continued uncertainty as to the reporting of index-priced transactions. In some cases, AGA states, filers included in line 3 or line 5 only those index-based transactions where the day of gas flow matched up with the index being used, and did not include, for example, transactions that were priced based on an average of gas price indices or transactions for future gas delivery based on historic gas price indices.

13. Thus, AGA recommends that the Commission modify lines 3 and 5 of the Form No. 552 to ask for "quantities that were contracted at prices that refer to daily price indices and "quantities that were contracted at prices that refer to monthly price indices," and remove the references to Next-Day and Next-Month delivery.

14. NiSource,[14] in its comments in response to the Technical Conference, also draws the Commission's attention to lines 3 and 5 on page 5 of Form No. 552.[15] NiSource recommends revising

[9] The FAQ is *available at http://www.ferc.gov/docs-filing/forms/form-552/form-552-faq.pdf.* Along with the FAQ, copies of relevant Commission orders and general filing guidance are provided. The Commission will update the FAQ as necessary and encourages potential Respondents to review the FAQ prior to filing Form No. 552.

[10] *Transparency Provisions of Section 23 of the Natural Gas Act,* Notice of Extension of Time (issued Apr. 9, 2009). The order provided for an extension of the filing deadline for calendar year 2008 data. Calendar year 2009 data must be submitted by May 1, 2010.

[11] Notice of Form No. 552 Technical Conference (Feb. 22, 2010).

[12] AGA Request for Clarification at p. 1.

[13] Instruction VII(h).

[14] In this docket, NiSource refers to the following affiliated distribution companies: Bay State Gas Company; Columbia Gas of Kentucky, Inc.; Columbia Gas of Maryland, Inc.; Columbia Gas of Ohio, Inc.; Columbia Gas of Pennsylvania, Inc.; Columbia Gas of Virginia, Inc.; Kokomo Gas and Fuel Company; Northern Indiana Public Service Company; and Northern Indiana Fuel and Light Company, Inc.

[15] These lines ask Respondents, respectively, "Of the amounts reported on line 1, what quantities were contracted at prices that refer to published Next-Day Delivery gas price indices?" and "Of the

them both so that each line begins "Of the amounts reported on line 1, *regardless of the date the transaction was executed,* * * *"[16] NiSource argues that this revision is in keeping with Order No. 704–B, which stated, "[i]ndex-based transactions are reportable even if they are not for Next-Day Delivery or Next-Month Delivery."[17]

2. Discussion

15. The Commission grants AGA's request. In granting AGA's request, we provide clarification that also addresses the root of NiSource's comments. The Commission's guiding principle is that all transactions that utilize a daily or monthly gas price index, contribute to index price formation, or could contribute to index price formation must be reported on Form No. 552. As Order No. 704–A stated:

> [T]he focus of Form No. 552's data collection is transactions that utilize an index price, contribute to index price formation, or could contribute to index price formation. Specifically, the Commission finds that volumes reportable on Form No. 552 should include volumes that utilize next-day or next-month price indices, volumes that are reported to any price index publisher, and any volumes that could be reported to an index publisher even if the respondent has chosen not to report to a publisher. By 'could be reported to an index publisher,' we mean bilateral, arms-length, fixed price, physical natural gas transactions between non-affiliated companies at all trading locations.[18]

In Order No. 704–B, in response to a request for clarification regarding retail end-use transactions, the Commission reiterated that "Form No. 552 requires reporting of volumes associated with transactions that utilize, contribute to, or could contribute to a price index."[19]

16. Transactions that utilize daily or monthly indices are reported on lines 3 and 5, respectively, of Form No. 552. Transactions that contribute to, or could contribute to a gas index are reported on lines 2, 4, 6 and 7 of Form No. 552. Consistent with the purpose of Order No. 704 of providing greater transparency concerning the use of indices to determine natural gas prices and how well index prices reflect market forces, the Commission seeks information concerning all transactions that use indices, regardless of any other aspect of the transaction. Thus, the Commission intended that all transactions using indices be reported on lines 3 and 5 no matter when they were transacted.[20] Such information is necessary to determine, for example, the volumetric relationship between (a) transactions that use indices to determine natural gas prices; and (b) the fixed-price next day or next month delivery transactions, NYMEX trigger agreements, including NYMEX plus contracts, and physical basis transactions that form gas indices.

17. Accordingly, we are modifying Form No. 552 to provide greater clarity. In particular, as requested by AGA, the Commission eliminates the references to "Next-Day Delivery" and "Next-Month Delivery" in page 4, lines 3 and 5 of Form No. 552 and revises the question on page 4, line 3 to ask for "quantities that were contracted at Prices that Refer to published Daily Indices*." The question on page 4, line 5 is similarly revised to ask for "quantities that were contracted at Prices that Refer to published Monthly Indices*."[21]

18. In addition, we are modifying the definitions in the Form No. 552 to provide additional guidance to respondents concerning what transactions should be treated as reportable transactions that refer to daily or monthly indices. In the revised definitions, the Commission clarifies that transactions that refer to "weekly," "yearly," or other gas price indices may, in fact, be based on daily gas price indices and are reportable on page 4, line 3 of Form No. 552. For example, a transaction that references a "weekly" index that is formed by averaging multiple daily indices is reportable as referencing a daily index. Similarly, a transaction that refers to a yearly index that is formed by averaging twelve monthly indices would be reported as referencing a monthly index.

19. The Commission also clarifies that the referenced index need not be solely a gas index. Thus, a transaction that relies on a basket of indices which includes a gas index and other daily or monthly indices such as coal, petroleum, LNG, inflation, etc. would also be reportable on lines 3 and 5 of the Form No. 552. The Commission will ask Respondents that use a basket of daily or monthly indices that includes gas and other indices to identify the names of the indices used on page 4 in line 8 or 9. The Commission reminds Respondents that the NYMEX Natural Gas Futures price outside of bidweek is not considered an index for purposes of Form No. 552 and is not to be reported.[22]

20. Finally, while all transactions referring to daily or monthly indices must be reported without regard to whether they are for next day or next month delivery, the fixed price transactions to be reported on lines 2, 4, 6 and 7 of the Form No. 552 are limited to transactions which are for next-day or next-month delivery. The transactions to be reported on those lines are transactions that contribute to gas index price formation, or could contribute to gas index price formation. The only fixed price transactions that can contribute to a daily price index are fixed price contracts for next day delivery. Similarly, the only fixed price contracts that can contribute to a monthly gas price index are contracts for next month delivery reported on lines 4, 6 and 7. The Commission is modifying and adding definitions in the Form No. 552 to make clear that the terms "Next-Day Delivery or Next-Month Delivery" only pertain to Fixed Price transactions which are reportable on lines 2 and 4, respectively[23] and to clarify what transactions on the form do or may contribute to daily and monthly gas price indices.

B. "Take or Release" Transactions

1. Request for Clarification

21. AGA states that gas is sometimes purchased under long-term contracts that offer the purchaser an option to either take (*i.e.*) purchase gas up to a contract maximum quantity on a monthly or daily basis or release the gas back to the seller for it to market to other purchasers. AGA refers to these contracts as "take or release contracts." AGA states that the orders in this proceeding do not specifically address how take or release transactions are to be reported. AGA notes that, under the definition of "Physical Natural Gas

amounts reported on line 1, what quantities were contracted at prices that refer to published Next-Month Delivery gas price indices?"

[16] NiSource Comments at 6.

[17] Order No. 704–B at P 15.

[18] Order No. 704–A at P 13.

[19] Order No. 704–B at P 13.

[20] Multi-year physical natural gas transactions that refer to an index would report only those volumes that flowed during a given reporting year in the Form No. 552.

[21] In particular, the revised Form No. 552, on page 4, line 3, asks for "quantities that were contracted at prices that refer to published daily gas price indices" and on page 4, line 5 asks for "quantities that were contracted at prices that refer to published monthly gas price indices."

[22] See Order No. 704 at P 113 ("Unlike in the NOPR, Form No. 552 no longer requests information on NYMEX contracts that go to physical delivery because the purpose of the form is to focus on fixed-priced spot transactions and how they are used. Further, information attributable to such contracts is available from NYMEX. Consequently, to reduce the burden on market participants, this instruction has been removed and a market participant may not include volume information related to physically-settled future contracts.")

[23] Lines 3 and 5 of the schedule appearing on page 4 of Form No. 552 have also been slightly modified to remove references to "Next-Day Delivery" and "Next-Month Delivery."

Transaction," Form No. 552 provides that "[i]t is not necessary that natural gas actually be delivered under the transactions, only that the delivery obligation existed in the agreement when executed." AGA believes that this raises the question whether the option to take or release a volume of natural gas under a take or release contract constitutes a "delivery obligation" within the meaning of "Physical Natural Gas Transaction" such that the optional amount the purchaser could take must be reported, or whether only the volumes that actually flowed under the contract should be reported.

22. AGA recommends that the Commission clarify that respondents must report only those volumes that actually flowed under a take or release contract. AGA believes that the option to take or release a portion of the volumes of natural gas under such a contract does not give rise to a delivery obligation that would make such volumes reportable. The nature of the contract is such that some portion of the contract volumes may or may not be delivered, and the exact amount of the volumes that must be delivered remains unknown until the purchaser actually exercises the option. In other words, the delivery obligation only arises when the option to take is actually exercised. Indeed, argues AGA, the parties to a take or release contract contemplate that some volumes will not be delivered at all. As a result, it is the quantity of gas that is actually delivered that has an impact on pricing, according to AGA. AGA recommends that the Commission clarify that the option to take or release a volume of natural gas under a take or release contract does not constitute a "delivery obligation" within the meaning of a "Physical Natural Gas Transaction" such that only the volumes that actually flowed under the contract are reportable on FERC Form No. 552.

2. Discussion

23. The Commission grants AGA's requested clarification. The Commission adopted the reporting requirements in the Form No. 552 in order to monitor the use of price indices in the natural gas market, including determining the volumetric relationships between (a) the fixed-price for next day or next month delivery and other transactions that form gas indices; and (b) transactions that use indices to price natural gas transactions. For this purpose, the Commission seeks information concerning what volumes of natural gas are purchased and sold in physical natural gas transactions based on price indices and what volumes are purchased under fixed price contracts which could contribute to a gas index. Where gas is sold under long-term contracts which give the purchaser an option to either take gas or release the gas back to the seller, the relevant volumes to be reported are those that actually flowed under the contract during the course of the year for which the report is being filed. An unexercised option to take gas under a contract does not constitute a reportable physical natural gas transaction.

24. The take or release contracts described by AGA differ from the contracts addressed by the statement in the Form No. 552 definition of "Physical Natural Gas Transaction" that "[i]t is not necessary that natural gas actually be delivered under the transactions, only that the delivery obligation existed in the agreement when executed." That statement contemplated a contract which required the seller to deliver a specified amount, without either party having any option to modify the amount to be delivered. By contrast, the take or release contracts give the purchaser an option whether to purchase. In the latter situation, only volumes actually delivered pursuant to the option should be reported on the form if they use an index, contribute to or may contribute to gas price formation.

C. Natural Gas Imported to the Lower 48 States

25. PG&E requests that the Commission clarify the reporting status of purchases of natural gas outside of the United States for use in the United States.[24] In particular, PG&E requests that the Commission clarify the reporting status of purchases by a Local Distribution Company (LDC) of gas outside the United States for use in the United States. PG&E argues that it is not clear from Order No. 704 and the orders on rehearing of Order No. 704 the extent to which gas purchase transactions by an LDC that occur outside of the United States are reportable on Form No. 552.[25]

26. In Order No. 704–A, the Commission addressed whether transactions outside the lower forty-eight states are reportable on Form No. 552. In relevant part, Order No. 704–A provides that:

> Regarding transactions involving possible international transportation, we clarify that: (1) Volumes originating outside the lower 48 states and delivered at locations outside the lower 48 states are not reportable; (2) volumes originating from inside the lower 48 states and delivered outside the lower 48 states are reportable; and (3) volumes delivered inside the lower 48 states are reportable. Thus, any volumes that originate or are delivered into the lower 48 states should be reported on Form No. 552 to the same extent as purely domestic volumes.[26]

The Commission reaffirms the above statement from Order No. 704–A and clarifies that it applies to all Respondents, including any LDC.

D. Unprocessed and/or Upstream Natural Gas

27. Order No. 704–A held that transactions involving unprocessed natural gas were not reportable on Form No. 552.[27] The Commission made this holding in response to two requests on rehearing of Order No. 704. Hess Corporation (Hess) requested that the order exclude entities engaged in transactions behind a processing plant priced pursuant to a percentage-of-proceeds contract under which the producer is entitled to receive a percentage of the proceeds realized by the buyer upon resale of the natural gas. Similarly, the Oklahoma Independent Petroleum Association (OIPA) sought rehearing of Order No. 704 so as to exempt producers of natural gas that sell wellhead gas at the initial first sales point under a percentage of proceeds contract.

28. On rehearing the Commission held, "transactions involving unprocessed gas should not be reported on Form No. 552 and should not be counted when determining whether an entity falls below the de minimis threshold. Transactions involving unprocessed natural gas are not relevant to wholesale price formation."[28] The Commission did not, however, define the term "unprocessed natural gas." Commission Staff sought further input at the Technical Conference on industry practice in order to determine whether upstream natural gas contributes to wholesale price formation.[29]

29. Through Staff's outreach efforts and the below comments, the Commission finds that there remains some confusion regarding the filing requirement and that Respondents have interpreted the requirement in various ways. Commission Staff administering Form No. 552 responded to a number of informal requests for clarification involving pipeline-quality natural gas. For instance, some Respondents questioned whether pipeline-quality natural gas that is sold directly into an interstate or intrastate natural gas pipeline without processing involved

[24] PG&E Request for Clarification at p. 1.

[25] *Id.* at p. 2. Furthermore, PG&E claims LDCs have been given conflicting unofficial guidance by Commission Staff on this issue.

[26] Order No. 704–A at P 74 (emphasis added).

[27] Order No. 704–A at P 78.

[28] *Id.*

[29] Notice of Form No. 552 Technical Conference.

"unprocessed natural gas" and, thus, need not be reported. Other Respondents reported transactions of pipeline-quality gas under the assumption that "unprocessed natural gas" was natural gas that required processing.

1. Comments

30. In general, commenters supported the unprocessed natural gas exemption, but were disparate in their understanding of what the precise metes and bounds of the exemption should be. Three commenters[30] simply request that the Commission promulgate a clear and consistent definition. Others propose specific definitions of the exemption, as laid out below. While some commenters seek a broadly-worded exemption, others recommend that some volumes be understood not to fall under the exemption.

31. Hess limits its concern to that in its original filing: That the Commission exclude transactions behind a processing plant priced pursuant to a percentage-of-proceeds contract.

32. DCP Midstream, LLC (DCP) recommends that Form No. 552 should be revised so as to only apply to Dry Natural Gas, using the definition developed by the Energy Information Administration (EIA):

> Natural gas which emains after: (1) The liquefiable hydrocarbon portion has been removed from the gas stream (*i.e.,* gas after lease, field, and/or plant separation); and (2) any volumes of nonhydrocarbon gases have been removed where they occur in sufficient quantity to render the gas unmarketable. Note: Dry natural gas is also known as consumer-grade natural gas. The parameters for measurement are cubic feet at 60 degrees Fahrenheit and 14.73 pounds per square inch absolute.[31]

Similarly, Independent Petroleum Association of America (IPAA) urges the Commission to use EIA definitions, and calls for a blanket exclusion of transactions involving unprocessed gas. IPAA argues that the Commission would still capture these volumes in transactions downstream of the processing facility.

33. Devon Energy Corporation (Devon) argues that the Commission has a choice between a definition based on gas quality, and a definition based on the type of transaction. Focusing on gas quality, it argues, runs the risk of requiring Respondents to conduct a complex, burdensome well-by-well examination of their supplies. Instead, it urges the Commission to clarify that the exclusion applies to Unprocessed Natural Gas Transactions, a phrase that it defines as "transactions in which title transfers prior to the physical act of process and [prior to when] the gas is physically delivered to a processing [facility]." Devon states that its definition would exclude some upstream transactions regardless of whether they reference an index or could be reported to an index. Nevertheless, it argues, any such volumes would be reported at the first non-affiliate sale downstream of the processing plant, so the Commission could adopt Devon's proposal without endangering its goal of facilitating price transparency in the wholesale market.

34. By contrast, Shell Producers[32] offer a three-part definition, which they argue is consistent with the guidance that Commission Staff has provided:

> (i) Title to the gas involved in the transaction passes to the buyer at, or upstream of, a processing plant;
>
> (ii) The gas is physically unprocessed at the time of the title transfer. (Wellhead separation and treating is not defined as processing for purposes of this exemption.); and
>
> (iii) Other transactions (not covered in (i) and (ii)) involving unprocessed gas are also exempt from reporting if they do not use, contribute to, or could contribute to a price index; however, if an unprocessed gas transaction is downstream of a plant (or no plant is in the vicinity) and does use, contribute to, or could contribute to a price index, the transaction is reportable.

Shell Producers also urge the Commission to clarify the difference between processing, treating, and separating natural gas.

35. Natural Gas Supply Association (NGSA), similarly, argues that there are situations in which it might be appropriate to report unprocessed gas transactions. NGSA gives the example of a firm-to-wellhead pipeline with long-haul shippers: producers often transfer title to long-haul shippers upstream of the processing plant, but only sell the net quantity of post-processing gas. NGSA argues that the parties to these transactions "should be allowed to report these volumes." This scenario aside, NGSA proposes to exempt transactions that meet both of two criteria:

> 1. Title to the gas involved in the transaction passes to the buyer at, or upstream of, a processing plant; and
>
> 2. The gas is physically unprocessed at the time of the title transfer.

2. Discussion

36. The Commission understands there is no uniform industry processing practice. As such, it is not practical for the Commission to attempt to provide guidance designed to address every situation involving natural gas that may be subject to processing. However, the Commission provides the following clarification to assist Respondents in meeting their Form No. 552 filing obligations.

37. The goal of Order No. 704–A is to facilitate transparency of the price formation process by collecting information concerning the use of indices to determine the price of natural gas and certain fixed prices in natural gas markets. As stated in Order No. 704–A: "the focus of Form No. 552's data collection is transactions that utilize an index price, contribute to index price formation, or could contribute to index price formation."[33] In response to Hess and OIPA's request to exempt transactions behind a processing plant priced pursuant to a percentage-of-proceeds contract under which the producer is entitled to receive a percentage of the proceeds realized by the buyer upon resale of the natural gas, the Commission in Order No. 704–A exempted unprocessed natural gas from the Form No. 552 data collection because "[t]ransactions involving unprocessed natural gas are not relevant to wholesale price formation."[34] Nothing has changed regarding our exemption of percentage-of-proceeds contracts associated with unprocessed gas. While this holding clearly exempts the particular transactions referred to by Hess and OIPA, it has not been clear to some Respondents whether the Commission does, indeed, intend to grant a broader exemption for unprocessed natural gas, and if so, how the Commission defines unprocessed natural gas.

38. The Commission clarifies that, within the context of Form No. 552, "unprocessed natural gas" refers to natural gas that is not yet processed, but will be processed prior to delivery to an end-user, and is sold on an unprocessed basis. The EIA defines unprocessed gas as "natural gas that has not gone through a processing plant."[35] EIA further defines a processing plant as "a surface installation designed to separate and recover natural gas liquids from a stream of produced natural gas * * * and to control the quality of natural gas

[30] Occidental Energy Marketing, Statoil Natural Gas, and Summit Energy Services.

[31] EIA, Energy Glossary, "D", *available at http://www.eia.doe.gov/glossary/glossary_d.htm* (May 19, 2010).

[32] In this docket, Shell Producers refers to Shell Gulf of Mexico Inc., Shell Offshore Inc., and SWEPI LP.

[33] Order No. 704–A at P 13.

[34] Order No. 704–A at P 78.

[35] EIA, *Energy Glossary,* "*U*", *available at http://www.eia.doe.gov/glossary/glossary_u.htm* (June 1, 2010).

* * *."[36] We apply the quoted definitions, with one exception. In some instances, lean natural gas may emerge from the wellhead without the need for any further processing to remove natural gas liquids before consumption. If this natural gas is produced and eventually transported to end users without any processing then transactions involving such natural gas are reportable at all stages, if the transactions use an index, or contribute to, or may contribute to gas index formation. Accordingly, transactions involving natural gas that is both (1) not processed; and (2) upstream of a processing facility (that is, volumes reasonably expected to travel through a processing facility before consumption) are not reportable.[37]

39. Whether certain natural gas is lean, separated, or treated does not necessarily resolve whether a transaction is reportable. Separation (the removing of water and petroleum liquids) and treatment (the removing of other impurities) are distinct from processing (the removal and recovery of natural gas liquids). Thus, wellhead separation and treatment do not necessarily render natural gas reportable under Form No. 552. In all instances, the question is whether the gas is of sufficient quality that it could contribute to gas index formation. To the extent a Respondent is unsure as to whether a particular transaction is reportable, it may request informal guidance from Staff or request waiver from the Commission.

E. Cash-out, Imbalance, and Operation-Related Transactions

40. In Order No. 704, we required market participants to report sale and purchase volumes related to cash-outs, imbalance make-ups, and operations.[38] These transactions include transactions to resolve shippers' transportation imbalances on pipelines and LDCs. Such imbalances are often cashed out pursuant to provisions in the pipeline or LDC tariffs based on specified price indices. The cash-out prices may be set at a premium to the relevant price index in order to penalize shippers which incur significant imbalances. These transactions also include operational purchases and sales by pipelines and LDCs and production-related balancing activities, such as those between producers and working interest owners.

41. In Order No. 704, we stated that, while some volumes related to such transactions are not utilized to create price indices, many volumes do refer to or utilize such indices, and therefore these transactions should be included in the Form No. 552 reports.[39] In Order No. 704–A, we reiterated, "It has been our experience that a significant number of balancing, cash-out, and similar transactions include references to price indices. Understanding the magnitude of this reliance on price indices is therefore a legitimate policy goal."[40]

42. After respondents filed their Form No. 552s for 2008, Staff reviewed the filings and made preliminary findings that the volumes of natural gas identified as cash-outs are relatively low in relation to the total reportable physical natural gas reported on Form No. 552. Therefore, Staff sought through the Technical Conference and comment process to better understand the burden and benefits of reporting these volumes.[41]

1. Comments

43. Almost every party that filed comments in response to the Technical Conference commented on cash-out and related transactions, including seven trade associations and six companies.[42] All of these Commenters urge the Commission to exclude cash-out and imbalance transactions in Form No. 552, and generally provide the same arguments for exclusion. Commenters claim that reviewing and reporting these transactions takes roughly between one-third and one-half of the person-hours that the typical Respondent devotes to Form No. 552.[43] Moreover, since cash-out and imbalance transactions are fairly unpredictable and spread out over a wide range of contracts, the process of reviewing them will not become significantly more efficient over time. In terms of volume, however, cash-out and imbalance transactions are relatively minor: between 0 and 3 percent of most Respondents' reportable volumes.[44] Volumes are low because cash-out and imbalance transactions are netting transactions. Finally, commenters argue that cash-out transactions take place after the fact as a method of settling imbalances, and thus cannot contribute to market price index formation.

44. AGA agrees with the other commenters that cash-out and imbalance transactions should be excluded from reporting on Form No. 552. AGA argues, however, that it may be appropriate to continue reporting operational volumes unrelated to the resolution of imbalances. For example, LDCs may purchase or sell wholesale volumes in advance to address balancing concerns on their distribution systems. Such advance purchases should continue to be reported, AGA argues, because the volumes are acquired through the typical procurement channels as their end-use volumes, and would require disproportionate effort to exclude from reports.

2. Discussion

45. Upon review of the comments in this docket, as well as Staff's review of initial year Form No. 552 submissions for 2008, we have reconsidered our position with regard to cash-out and imbalance transactions. As several Commenters note, cash-out and imbalance transactions represent an insignificant portion of the total reportable volumes because the transactions, while frequent, do not accumulate to significant volumes for any one Respondent. The Commission's interest is in aggregated totals, so eliminating cash-out and imbalance transactions has little effect on our mission to monitor aggregate reliance on indices. Further, given the after-the-fact nature of accounting for these sorts of operational transactions, we find that it may be unduly burdensome for some Respondents to report these volumes as compared to any benefit achieved by such reports. Accordingly, Respondents are no longer required to report cash-out, and imbalance transactions that refer to or use indices or that may contribute to gas indices. However, as AGA requests, respondents should continue to report transactions related to operational volumes unrelated to the resolution of imbalances. These operational volumes are commonly used

[36] EIA, *Energy Glossary,* "*P*", *available at http://www.eia.doe.gov/glossary/glossary_p.htm* (June 1, 2010).

[37] The Commission understands that, in limited circumstances, a seller of natural gas may not know whether the purchaser intends to process natural gas prior to transportation to an end-user. In such case, the seller should report the relevant volumes on Form No. 552.

[38] Order No. 704 at P 107.

[39] Order No. 704 at P 108.

[40] Order No. 704–A at P 61.

[41] Notice of Form No. 552 Technical Conference.

[42] The trade associations are AGA, Electric Power Supply Association (EPSA), Interstate Natural Gas Association of America (INGAA), IPAA, NGSA, Northwest Industrial Gas Users (NWIGU), and Process Gas Consumers Group (PGC). The companies are Carolina Gas Transmission Corporation (CGT), DCP, Devon, NiSource, Shell Producers, and Summit Energy Services (Summit).

[43] Commenters state that they or their members devoted the following person-hours, or proportion of person-hours, to cash-out and imbalance volumes. DCP: 90 person-hours or half their time; IPAA: 100 person-hours (data for one representative member); NGSA: 50 person-hours; PGC: 32 percent; Shell Producers 30 person-hours.

[44] As a percentage of total reportable volumes, Commenters state that they or their members reported the following cash-out and imbalance volumes. AGA: under 3 percent; DCP: 1 percent; Devon: under 1 percent; IPAA: under 1 percent (data for one representative member); NGSA: 0.5 percent; PGC: 1 percent; Shell Producers: zero.

to maintain system pressure and provide line pack for pipelines and other gas distributions systems.

F. Unit of Measurement

46. Form No. 552 required respondents to report transactions in trillions of British Thermal Units (TBtu). However, this caused some confusion among filers whose transactions were expressed in other measurement units, such as MMBtus (millions of British Thermal Units) as to how to convert those transactions to TBtus. As a result, converting data to TBtus led to a number of filing errors, and subsequent resubmissions to correct the data were required. Accordingly, Staff sought feedback on whether to change the reporting units to a more common magnitude or unit.[45]

1. Comments

47. While several parties filed comments on the appropriate unit of measurement, the commenters generally stated that the issue is minor relative to their other concerns. IPAA, for instance, favors retaining TBtus in order to "minimize disruption," but states that "this recommendation is less urgent than" its other requests.[46] DCP and NGSA briefly ask the Commission to continue with TBtus which, NGSA states, is reflective of the way gas is purchased and sold in the wholesale market. NWIGU, however, asks the Commission to switch to MMBtus or another more common unit. Summit, rather than recommending a unit, instead recommends that in the event that the Commission continues with TBtus, the instructions to Form No. 552 should provide more detail on how to convert other units to TBtus.

48. AGA does not reach a firm conclusion, but offers the most detailed analysis. In favor of a new unit, it notes that the NAESB Base Contract Transaction Confirmation Form uses millions of British Thermal Units (MMBtus) as its base unit, and defines an MMBtu as equal to a dekatherm. It also suggests that "[r]eporting at the thousand-dekatherm (or BBtu) level would provide * * * 100 times more detail than currently reported."[47] AGA warns, however, that either switch could prove to be too fine a level of detail, leading to unnecessary revisions, or could lead to another round of conversion errors as Respondents adjust to the new reporting magnitude. If no change is made, AGA recommends that Form No. 552 include a definition advising Respondents that 1 TBtu is equal to 1,000,000 MMBtu.

2. Discussion

49. Given the lack of interest in changing units, the Commission will retain the TBtu as its unit of reporting. While Staff's review of the initial Form No. 552 submissions found numerous unit-conversion errors, it also appears that correcting those errors has been relatively simple for Respondents, and that Respondents anticipate far fewer errors going forward. We acknowledge, however, the confusion caused by using a unit that is orders of magnitude greater than the units commonly used in most natural gas contracts.

50. Accordingly, the revised Form No. 552 will include a brief description of the proper conversion ratios. A TBtu is one trillion British Thermal Units; a BBtu is one billion British Thermal Units; and an MMBtu is one million British Thermal Units. A dekatherm (Dth) is, by definition, one MMBtu. One thousand Cubic Feet (Mcf) of natural gas at standard pressure and heat content produces almost exactly one MMBtu of heat, so these terms may be treated as equal for purposes of Form No. 552 unless doing so would produce a significantly misleading result; similarly, one billion Cubic Feet (Bcf) may be treated as equal to one TBtu. Thus, when filing Form No. 552, respondents should convert as follows: 1 TBtu = 1,000 BBtu = 1,000,000 MMBtu = 1,000,000 Dth = 1,000,000 Mcf = 1 Bcf.

G. Blanket Certificates

51. In Order No. 704, the Commission required that each market participant, including a *de minimis* market participant, state in the Form No. 552 whether it operates under a blanket sales certificate issued under § 284.402 or § 284.284 of the Commission's regulations.[48] Section 284.402 grants to any entity which is not an interstate pipeline a blanket marketing certificate, authorizing it to make sales for resale at negotiated rates in interstate commerce of any category of gas that is subject to the Commission's NGA jurisdiction. Section 284.284 grants open access interstate pipelines a blanket certificate to make unbundled sales.

52. Order No. 704 stated that the requirement for market participants to state whether they operate under a blanket sales certificate would give the Commission a measure of the number of holders of such certificates. The Commission also stated that it would permit some breakdown of market information between jurisdictional and non-jurisdictional components, which is useful for effective oversight and monitoring for market manipulation.[49]

1. Comments

53. In its comments after the technical conference, NGSA seeks clarification of when a market participant should be considered to be operating under a blanket marketing certificate. It points out that § 284.402(a) automatically grants the blanket marketing certificate to all market participants who are not interstate pipelines, without the need to file an application for the certificate or for any Commission action. It also notes that § 284.402(d) authorizes abandonment under NGA section 7(b) of any sales service performed under the certificate upon the expiration of the contractual term of that service or upon termination of each individual sales arrangement. NGSA asserts that these provisions create confusion as to whether a respondent has operated under the blanket certificate in certain scenarios. NGSA explains:

> It is not clear if a company that used a blanket marketing certificate in year one for certain transactions, but didn't use the certificate in subsequent years, continues to hold the certificate in perpetuity (unless the certificate is rescinded by the Commission); or whether a new certificate is allowed in a subsequent year if the company needs to enter into a transaction that requires a blanket certificate. If the future transaction is several years later, should the company be required to report in interim year Form 552's that it holds a blanket marketing certificate or is it acceptable for the company to assume the original certificate was abandoned when the original transactions ended; and a new certificate commences with the subsequent transaction?[50]

54. NGSA recommends that the Commission clarify that the reporting requirement only applies if the respondent actually used the blanket marketing certificate during the reporting year. It requests clarification that this reporting requirement be limited to market participants using a blanket marketing certificate above the *de minimis* volume.

2. Discussion

55. The Commission has determined to remove from Form No. 552 the requirement that market participants state whether they operate under a blanket sales certificate issued under either § 284.402 or § 284.284 of the

[45] Notice of Form No. 552 Technical Conference.

[46] IPAA Comments at 4.

[47] AGA Comments at 6.

[48] The current Form No. 552 implements this requirement by asking, "At any time during the report year, did the Reporting Company operate under a Blanket certificate?"

[49] Order No. 704 at P 91.

[50] NGSA Comments at 8.

Commission's regulations.[51] Our experience reviewing completed reports for the year 2008 indicates that this requirement does not provide sufficiently useful and reliable information to justify its continuation.

56. As illustrated by NGSA's request for clarification, it can be difficult for market participants to know whether they have operated under a blanket marketing certificate during a reporting year. A market participant only operates under a blanket marketing certificate when it makes a sale subject to our NGA jurisdiction. In order for a sale to be within our NGA jurisdiction it must be a sale for resale in interstate commerce, which does not qualify a "first sale" of natural gas, as defined in section 2(21) of the Natural Gas Policy Act.[52] The first sale definition is very complicated. As the Commission explained in Order No. 644:

> Under the NGPA, first sales of natural gas are defined as any sale to an interstate or intrastate pipeline, LDC, or retail customer or any sale in the chain of transactions prior to a sale to an interstate or intrastate pipeline or LDC or retail customer. NGPA section 2(21)(A) sets forth a general rule stating that all sales in the chain from the producer to the ultimate consumer are first sales until the gas is purchased by an interstate pipeline, intrastate pipeline, or LDC. Once such a sale is executed and the gas is in the possession of a pipeline, LDC, or retail customer, the chain is broken, and no subsequent sale, whether the sale is by the pipeline, or LDC, or by a subsequent purchaser of gas that has passed through the hands of a pipeline or LDC, can qualify under the general rule as a first sale of natural gas. In addition to the general rule, NGPA section 2(21)(B) expressly excludes from first sale status any sale of natural gas by a pipeline, LDC, or their affiliates, except when the pipeline, LDC, or affiliate is selling its own production.[53]

57. Thus, whether a market participant makes a sale pursuant to the blanket marketing certificate depends on a number of factors, including whether: (1) The gas was previously purchased and sold by a pipeline or LDC; (2) whether the purchaser will resell the gas; (3) whether the seller is pipeline, LDC or an affiliate thereof; and (4) if so, whether the seller is selling gas produced by any member of the affiliated group. Because the first two of these factors involve events occurring before and after the relevant sale, it is possible that a market participant may not have all the information necessary to determine whether its sale is subject to NGA jurisdiction and thus made pursuant to the blanket marketing certificate. For example, it may be particularly difficult for the market participant to know whether the gas it is selling previously passed through the hands of a pipeline or LDC. Moreover, for many market participants the relevant factors causing a sale to be subject to our NGA jurisdiction will be present for some sales, but not others. Thus, such market participants will be operating pursuant to the blanket marketing certificate for only some portion of their sales, not all.

58. As a result of these complications, the responses to the Form No. 552 blanket certificate question have not provided useful information to the Commission. The Commission had hoped that those responses would permit some breakdown of market information between jurisdictional and non-jurisdictional components. However, given the widespread confusion as to whether particular sales are jurisdictional, the market participants' statements in the Form No. 552 as to whether they operated under the blanket marketing certificate do not appear reliable. Moreover, a simple statement of whether the market participant made sales pursuant to the blanket marketing certificate does not reveal whether those sales constituted most, or only a very few, of the market participant's sales. Without that information, it is not possible to determine, with any degree of accuracy, what proportion of gas sales are subject to our NGA jurisdiction.[54] In any event, information about whether sales are jurisdictional is not relevant to the fundamental purpose of the Form No. 552, which is to obtain information concerning the relative volumes of fixed price transactions that contribute or may contribute to a gas index versus the volume of transactions that refer to indices. For all these reasons, the Commission eliminates the requirement that market participants report whether they make sales under a blanket certificate. Accordingly, the Commission will modify section 260.401 of its regulations to strike 18 CFR 260.401(b)(1)(i), which prevented blanket certificate holders from benefiting from the *de minimis* exemption to the annual filing requirement. The instructions on Form No. 552 shall be modified to reflect this holding.

H. Other Substantive Requested Clarifications

59. Several commenters, in responding to the issues raised at the Technical Conference, took the opportunity to raise other issues related to Form No. 552. Some of these comments concerned the timing and enforcement of the revised reporting requirements, mainly in the form of the requests for extension of time noted below. In addition, DCP states that it "does not support significant changes * * * that would require another burdensome process." Similarly, IPAA requests an extension of the safe harbor for any inadvertent errors, while NWIGU and NGSA request an extension of the safe harbor period in the event that the Commission makes any substantive changes to Form No. 552 in this or future orders.

60. In response to DCP's comments, we clarify that the present order does not require Respondents who have under-reported or mis-reported their 2008 Form No. 552 to correct their filings based on our guidance herein.

61. We will not institute any additional safe-harbor period. However, as previously stated, the Commission will focus any enforcement efforts on instances of intentional submission of false, incomplete, or misleading information to the Commission, of failure to report in the first instance, or of failure to exercise due diligence in compiling and reporting data.[55]

62. NGSA also raises the issue of whether a Sarbanes-Oxley[56] signoff standard applies to Form No. 552's signature requirement. NGSA argues that it does not, and urges the Commission to clarify that the entity signoff can be from any official that is able to bind the company.

63. The Commission does require Annual Corporate Officer Certification and Sarbanes-Oxley signoff for some forms: *e.g.,* Form Nos. 1, 2, 2–A, 6, 60, 3–Q, and 6–Q. These forms are financial reports that include balance sheets, income statements, and similar financial data. However, we do not interpret the Sarbanes-Oxley Act to compel the Commission to require such a standard

[51] The current Form No. 552 implements this requirement by asking, "At any time during the report year, did the Reporting Company operate under a Blanket certificate?"

[52] The Natural Gas Wellhead Decontrol Act of 1989 removed all "first sales" from our NGA jurisdiction.

[53] *Amendments to Blanket Sales Certificates,* Order No. 644, FERC Stats. & Regs., Regulations Preambles 2001–2005 ¶ 31,153, at P 14 (2003) (Order No. 644). *See also* Order No. 644 at P 22, clarifying the provision concerning an affiliate's own production.

[54] Interstate pipelines filing the Form No. 552 reported insignificant volumes of sales pursuant to the § 284.284 blanket certificate authorizing pipelines to make unbundled sales. Few, if any, pipelines use that certificate, because almost all pipeline exited the merchant business after Order No. 636.

[55] Order No. 704 at P 114.

[56] Sarbanes-Oxley Act of 2002, Public Law 107–204, 116 Stat. 745. In certain situations, the Sarbanes-Oxley Act requires chief corporate officers to personally vouch for the veracity, timeliness, and fairness of their companies' public disclosures.

for Form No. 552. At this time, we believe that it is sufficient that the person signing Form No. 552 be one whose signature legally binds the company with respect to the accuracy and completeness of the submission. The instructions on Form No. 552 as well as the form shall be modified slightly to clarify this holding.

64. NiSource requests that the Commission exempt from reporting any "transactions that occur under a local distribution company's state-approved retail tariff that refer to next-day or next-month price indices." [57] NiSource states that gathering such information is administratively burdensome for it because NiSource has several state-approved tariffs among several affiliates and currently lacks "one consistent IT system that can be used to pull this data." [58] NiSource also states that some of these tariffs only rely upon index prices when certain conditions are met, and that NiSource's IT systems only record the actual price and fail to record the reason why the price was charged. NiSource states that, among its nine LDC affiliates, it has identified 26 state-approved tariff provisions that refer to gas price indices, providing for different variations of cash-outs and a number of imbalance situations.

65. We reject the requested exemption for state-approved retail tariffs. All of the examples of reportable transactions that NiSource gives in its comments involve cash-out or imbalance provisions. Accordingly, the exemption granted above in this order for cash-out and imbalance transactions that reference a price index appears to sufficiently address NiSource's concerns.

III. Other Non-Substantive Modifications

66. In response to informal questions by Respondents and in an effort to make the Form No. 552 more user friendly, we approve a number of other non-substantive modifications to Form No. 552. These modifications do not affect the data to be collected by Respondents and provided on the form. However, the modifications more clearly identify the data to be provided and more understandable direction to Respondents. A copy of revised Form No. 552 is attached to this order.[59]

67. For example, the instructions to Form No. 552 have been modified to allow potential Respondents to more easily determine whether they must submit the form, the types of transactions that are reportable, and the procedure to eFile the form. The instructions also explain that typing the name of the company officer constitutes an electronic signature of a company officer is acceptable under the Commission's regulations.[60] Additionally, the schedule on page three of Form No. 552 is modified to explain that each Respondent Reporting Company and Affiliate should be listed and required to answer the questions on the schedule.

68. The Commission believes that the modifications to Form No. 552 will provide regulatory certainty and reduce erroneous filings by Respondents. We encourage potential Respondents to utilize other Commission resources should they have questions regarding the filing of Form No. 552. In addition to consulting the Form No. 552 FAQ at *http://www.ferc.gov/docs-filing/forms/form-552/form-552-faq.pdf* and other filing guidance at *http://www.ferc.gov/docs-filing/forms/form-552/fil-instr.asp,* Respondents may request informal assistance through our Compliance Help Desk or by submitting questions via e-mail to *form552@ferc.gov.*

IV. Information Collection Statement

69. The Office of Management and Budget (OMB) regulations require that OMB approve certain reporting, recordkeeping, and public disclosure (collections of information) imposed by an agency.[61] The information collection requirements or Form No. 552 respondents were approved under OMB Control No. 1902–0242. This order further revises these requirements in order to more clearly state the obligations imposed in Order No. 704. While the net result of these revisions is to decrease the overall burden as well as the number of Respondents, because the Commission has made "substantive or material modifications" to the information collection requirement, we will submit them for OMB review under the Paperwork Reduction Act.[62]

70. The Commission identifies the information provided under Part 260 as contained in FERC Form No. 552. The Commission solicited comments on the need for this information, whether the information would provide useful transparency information, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing respondents' burden. Where commenters raised concerns that information collection requirements would be burdensome to implement, the Commission has addressed those concerns above in this order.

71. In Order No. 704, the Commission estimated the burden for complying with the Final Rule as follows:

Data collection part 260 FERC form No. 552	Number of respondents	Number of responses per respondent	Estimated annual burden hours per respondent	Total annual hours for all respondents	Estimated start-up burden per respondent
Annual Reporting Requirement	1,500	1 per year	4	6,000	40 hours.

The Commission further estimated average annualized cost for each respondent to be the following:

FERC form No. 552	Annualized capital/startup costs (10 year amortization)	Annual costs	Annualized costs total
Annual Reporting Requirement	$400	$400	$800

[57] NiSource Comments at 1.

[58] NiSource Comments at 4.

[59] The copy of the Form No. 552 in the Appendix should not be eFiled with the Commission at this time. Staff will make available a fillable PDF Form No. 552 at a later date.

[60] *See* 18 CFR 385.2005(c).

[61] 5 CFR 1320.

[62] *See* 44 U.S.C. 3507(h)(3).

The Commission did not change its burden estimate upon release of Order Nos. 704–A or 704–B.

72. Several factors influence the Commission's revised numbers. If the Commission were making no changes to Order No. 704–B, then it would be revising the estimates upward. Many Respondents reported unexpectedly high start-up burdens, primarily due to the difficulty of gathering information on cash-out and imbalance transactions. However, virtually every clarification or revision provided above in this order should act to reduce the burden on Respondents. In addition, the experience in filing the initial Form No. 552 reports should drastically reduce the start-up burden in responding to the revised Form No. 552.

73. Based on data collected for calendar year 2008, the number of Respondents was 1,109, not 1,500 as estimated. The elimination of the requirement for parties to file information about their use of certain blanket certificates should reduce the number of Respondents even further, as 369 Respondents filed solely to meet the blanket certificate reporting requirement. As a result, the Commission estimates the burden for complying with the Final Rule as follows:

Data collection part 260 FERC form No. 552	Number of respondents	Number of responses per respondent	Estimated annual burden hours per respondent	Total annual hours for all respondents	Estimated start-up burden per respondent
Annual Reporting Requirement	740	1 per year	4	2,960	5 hours.

Information Collection Costs: The average annualized cost for each respondent is projected to be the following:

FERC form No. 552	Annualized capital/startup costs (10-year amortization)	Annual costs	Annualized costs total
Annual Reporting Requirement	$50	$400	$450

Title: FERC Form No. 552.

Action: Proposed Revised Information Filing.

OMB Control No: 1902–0242.

Respondents: Business or other for profit.

Frequency of Responses: Annually.

Necessity of the Information: The annual filing of transaction information by market participants is necessary to provide information regarding the size of the physical natural gas market, the use of the natural gas spot markets and the use of fixed- and indexed-price transactions. The revisions to the filing reduce the burden to respondents.

74. Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 [Attention: Michael Miller, Office of the Executive Director], e-mail: *DataClearance@ferc.gov,* Phone: (202) 502–8415, Fax: (202) 273–0873.

For submitting comments concerning the collection of information and the associated burden estimate(s), please send your comments to the contact listed above and to: Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission], Phone: (202) 395–4638, Fax: (202) 395–7285.

Due to security concerns, comments should be sent electronically to the following e-mail address: *oira_submission@omb.eop.gov.* Please reference OMB Control No. 1902–0242 and the docket number of this order in your submission.

V. Document Availability

75. In addition to publishing the full text of this document, except for the Appendix, in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document, including the Appendix, via the Internet through FERC's Home Page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

76. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document, including the Appendix, is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

77. User assistance is available for eLibrary and the FERC's Web site during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or e-mail at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. E-mail the Public Reference Room at *public.referenceroom@ferc.gov.*

VI. Extension of Time

78. On May 24, 2010, the Secretary of the Commission issued in this docket an extension of time until September 1, 2010 for Respondents to file Form No. 552 with calendar year 2009 data.[63] The report for calendar year 2010 remains due on May 1, 2011, as per § 260.401(b)(2) of the Commission's regulations.

79. OMB regulations require a notice and comment period before changes to the Code of Federal Regulations may take effect. Accordingly, this order's revision to section 260.401 exempting blanket certificate holders with *de minimis* transaction volumes will be effective September 30, 2010. In order to allow these entities to be exempt from the 2009 filing requirement, and also to allow other Respondents to review and revise their data in light of the clarifications provided in this order, Respondents are granted an extension of time until October 1, 2010 to file calendar year 2009 data.

The Commission orders:

(A) AGA's and PG&E's requests for clarification are granted as described herein.

(B) FERC Form No. 552 is modified as discussed herein.

(C) Form No. 552 Respondents are granted an extension of time until

[63] *See* 18 CFR 375.302(b).

October 1, 2010 to file calendar year 2009 data.

List of Subjects for 18 Part 260

Natural gas, Reporting and recordkeeping requirements.

By the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

■ In consideration of the foregoing, the Commission amends part 260, Chapter I, Title 18, Code of Federal Regulations to read as follows:

PART 260—STATEMENTS AND REPORTS (SCHEDULES)

■ 1. The authority citation for part 260 continues to read as follows:

Authority: 15 U.S.C. 717–717w, 3301–3432; 42 U.S.C. 7101–7352.

§ 260.401 [Amended]

■ 2. Section 260.401 is amended as follows:

■ a. Paragraph (b)(1)(i) is removed.

■ b. Paragraphs (b)(1)(ii) and (iii) are redesignated as paragraphs (b)(1)(i) and (ii) respectively.

[FR Doc. 2010–15118 Filed 6–22–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 9490]

RIN 1545–BJ12

Extended Carryback of Losses to or from a Consolidated Group

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations under section 1502 that affect corporations filing consolidated returns. These regulations contain rules regarding the implementation of section 172(b)(1)(H) within a consolidated group. These regulations also permit certain acquiring consolidated groups to elect to waive all or a portion of the pre-acquisition carryback period pursuant to section 172(b)(1)(H) for specific losses attributable to certain acquired members. The text of these temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section in this issue of the **Federal Register**.

DATES: *Effective Date:* These regulations are effective on *June 23, 2010.*

Applicability Date: For date of applicability, *see* § 1.1502–21T(h)(9)(i). The applicability of these regulations will expire on June 21, 2013.

FOR FURTHER INFORMATION CONTACT: Grid Glyer, (202) 622–7930 (not a toll-free number).

SUPPLEMENTARY INFORMATON:

Paperwork Reduction Act

These regulations are being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collection of information contained in these regulations has been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget under control number 1545–2171. Responses to this collection of information are required to obtain a benefit.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

For further information concerning this collection of information, and where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the cross-referencing notice of proposed rulemaking published in the Proposed Rules section of this issue of the **Federal Register**.

Books or records relating to the collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

Section 172(b)(1) provides, in part, that a net operating loss for any taxable year must generally be carried back to each of the two taxable years preceding the taxable year of the loss. Section 172(b)(3) provides that any taxpayer entitled to a carryback period pursuant to section 172(b)(1) may elect to relinquish the carryback period with respect to a loss for any taxable year. An election to relinquish the carryback period pursuant to section 172(b)(3) must be made by the due date (including extensions) of the taxpayer's return for the taxable year of the loss and in the manner prescribed by the Secretary. Normally, this election is irrevocable. A consolidated group is permitted to make this election for its entire consolidated net operating loss (CNOL) pursuant to the procedures provided in § 1.1502–21(b)(3)(i). In addition, § 1.1502–21(b)(3)(ii)(B) permits an acquiring consolidated group to make a separate election to waive, for all taxable years of the acquiring group, and solely with respect to all consolidated net operating losses attributable to certain acquired members, the portion of the carryback period for which the acquired corporations were members of another group. This election is irrevocable and must be made by the due date (including extensions) of the acquiring group for the taxable year of the acquisition.

Section 172(b)(1)(H) was amended by the Worker, Homeownership, and Business Assistance Act of 2009, which was signed by the President on November 6, 2009 (Pub. L. 111–92, 123 Stat. 2984) (the Act). As amended, section 172(b)(1)(H) allows taxpayers to elect to extend the standard two-year carryback period for an additional period of up to three years (Extended Carryback Period) for a net operating loss arising in a single taxable year ending after December 31, 2007, and beginning before January 1, 2010 (Applicable NOL). However, section 172(b)(1)(H) does not apply to any taxpayer if that taxpayer, or any member of the taxpayer's affiliated group (within the meaning of the Act), is described in section 13(f) of the Act.

As described in Revenue Procedure 2009–52, 2009–49 IRB 744, section 13(e)(4) of the Act permits any taxpayer that previously elected pursuant to section 172(b)(3) to forgo the carryback period for a loss arising in a taxable year ending before the date of enactment of the Act (November 6, 2009) to revoke such election in order to take advantage of the Extended Carryback Period, provided that the taxpayer revokes the election before the due date (including extensions) for filing the return for the taxpayer's last taxable year beginning in 2009. Revenue Procedure 2009–52 also permits a taxpayer that filed an application for a tentative carryback adjustment or an amended return using the two-year carryback period for an Applicable NOL to file certain forms to claim the Extended Carryback Period provided pursuant to section 172(b)(1)(H). Revenue Procedure 2009–52 further clarifies that a taxpayer includes an affiliated group filing a consolidated return, an Applicable NOL includes a CNOL, and the section